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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1952.

No. 217.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

SEVEN-UP BOTTLING COMPANY OF MIAMI, INC.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF

For the Seven-Up Bottling Company of Miami, Inc., in Opposition.

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OPINIONS BELOW.

The opinion of the Court below (R. 124-128) is reported at 196 F. 2d 424; Findings of Fact, Conclusions of Law, and Order of the Board (R. 71-114) are reported at 92 NLRB 1622.

JURISDICTION.

The judgment of the Court below was entered on April 29, 1952 (R. 128). A Petition for Rehearing, filed by the Company on May 6, 1952, was denied on June 18, 1952 (R. 129, 134). The Decree, detailing the terms of the judgment, was entered on July 8, 1952 (R. 135-136). The

jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended, 61 Stat. 136.

STATUTE INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. IV, 141, et seq.), are set forth in the Appendix to the Petition for Certiorari (pp. 16-18).

QUESTIONS PRESENTED.

(1) Shall the Supreme Court grant certiorari to review the finding by the Court of Appeals for the Fifth Circuit that the evidence in the Record before that Court did not support the Decision and Order of the National Labor Relations Board, sought to be enforced in that Court?

(2) Did the Court below err in finding that the Board's departure from the statutory method of calculating back pay, as approved by this Court and by the several Courts of Appeal, was not warranted by the evidence certified by the Board to the Court below?

(3) May the National Labor Relations Board, under the guise of administrative convenience, determine upon a method of awarding back pay under the National Labor Relations Act, which imposes a penalty upon the employer by granting to the employee sums in excess of what such employee would have earned had he remained in the employer's employ?

STATEMENT.

The Court of Appeals for the Fifth Circuit determined that the Transcript of Evidence before the National Labor Relations Board in this case did not contain substantial evidence justifying the computation of back pay in such

a manner as to require the Company to pay sums in excess of the amount an employee would have earned less his actual earnings during the period of discrimination. The terms of the Order of the Board require the Company to compute and pay back pay to employees in each three month period of each calendar year.

The Board's Order, rejected by the Court below, specifically provides that actual earnings for each quarter shall be deducted from normal expected earnings for each quarter but that excess earnings in one quarter shall not be considered as offsetting expected earnings in another quarter. Thus, if in one three month period the actual earnings of the employees were in excess of normal expected earnings from the Company, such excess under the Board's Order could not be offset against earnings in another quarter when the employee, for example, had no actual earnings.

The policy of the Board prior to the so-called "Woolworth Formula" consisted of crediting the employee with all amounts he would have earned had he continued with the employer, less any amounts actually earned from other employment during the same period. This formula achieved the result of putting the employee in the exact financial position he would have been in had no discrimination been visited upon him and, accordingly, the employer was not subjected to additional penalty or punitive award. This, we submit, constitutes "making whole" the employee. The Board's long-standing method of computing back pay was devised following decisions of this Court which, in the early years of the National Labor Relations Board's existence, held that the National Labor Relations Board was without statutory authority or warrant to devise or impose punitive measures against employers in the nature of penalties and fines. Moreover, this Court has in the specific instances cited herein often passed upon the

validity of the Orders of the National Labor Relations Board with respect to remedial directives issued to employers by the Board.

An illustration will demonstrate more clearly the effect of the Board's Order as contrasted with the Judgment and Decree of the Court below. In the case of an employee whose period of discrimination was, for example, from January 1 to December 31 of a single year and whose rate of pay was $500 per month, or $6,000 per annum; if we assume, for the purposes of this illustration, that such employee during the months of January, February, and March of such year earned from outside employment $3,000; during the months of April, May and June earned $300; during the months of July, August and September earned $3,000; and during the months of October, November and December earned $300. The employee's earnings with his former employer, but for the discrimination, would have been $6,000 for the whole period. The employee's earnings during the period of discrimination were actually $6,600. He, therefore, would be entitled to no back pay under the Decree of the Court below. Under the Board's new formula, however, the same employee would have been entitled to no back pay for the first and third quarters and $1,200 for each the second and fourth quarters, or a total back pay of $2,400, in addition to and in spite of the fact that he earned $6,600 in outside employment during the period.

The Board concedes in its Brief in Support of the Petition for Certiorari that the purpose accomplished by the "Woolworth" method of computing back pay invariably results in the employee's receiving all that he would have earned less actual earnings and that in most, if not all, cases, the employee receives amounts in excess of the difference between the amount the employee would have earned and the amount actually earned during the entire

period involved. In substance, the new back pay formula of the Board, as indicated in the Board's Brief, results in an additional payment to the individual employee that the Board seeks to justify as compensation for anticipated indirect or intangible losses which the individual may not have incurred.

The Court below concluded that the Record in this case was devoid of any facts or evidence which would justify the adoption by the Board of a method for computing back pay which was designed to assess against the Respondent amounts in excess of the difference between earnings the employees would have received and amounts they earned elsewhere.* This Court is thus called upon by the Petition for Certiorari to review a determination of a Court of Appeals wherein the Court of Appeals found that the evidence contained in the Record was insufficient to sustain the Order issued by the Board.

This Court recently announced its future intention to refuse to review or to reverse a Court of Appeals on a matter of judgment involving a review of the sufficiency of the Record. The Court in **NLRB v. American National Insurance Company**, decided in May of this year, stated in a like situation:

> ". . . Last term we made it plain that Congress charged the Courts of Appeal, not this Court, with the normal and primary responsibility for reviewing the conclusions of the Board. We stated that this Court 'is not the place to review a conflict of evidence nor to reverse a Court of Appeals, because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find

* Contrary to the statement in the Petition for Certiorari, the United States Court of Appeals for the Fifth Circuit in the matter of **Shell Oil Co. v. NLRB**, 196 F. 2d 637, on June 17, 1952, entered a Supplemental Decision and Decree modifying another Order of the National Labor Relations Board in substantially the same particulars as the Order in this case was modified (30 LRRM 2374, CCH Para. 67048).

it tilting either way.' Labor Board v. Pittsburgh S. S. Co., 340 U. S. 498, 503. We repeat and reaffirm this rule. . . ."

(NLRB v. American National Insurance Co., 72 S. Ct. 824, 832, 96 L. Ed. 721, 730.)

The Board presents no legal justification for its request that a Certiorari issue to the Judgment of the Court of Appeals; indeed, there is none. The Court of Appeals determined that the Record facts did not sustain the Order of the Board. The Petition for Certiorari does not dispute the absence of substantial evidence to support such Order. Instead, the petition assumes the inaccuracy of the Judgment of the Court of Appeals and proceeds to justify levy of a penalty on the basis of administrative expediency which is neither authorized by law nor sanctioned by judicial interpretation.

The authority of the Board to order back pay is found in Section 10 (c) of the Act and provides in this respect:

". . . If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and **to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.** . . ." (Emphasis supplied.)

[Section 10 (c), Labor Management Relations Act of 1947, 61 Stat. 136, 29 U. S. C., Supp. IV, 141 et seq.]

This Court has recently had an occasion to review the history of the interpretations of the reinstatement and back

pay provisions of the National Labor Relations Act, including prior interpretations by this and the Courts of Appeal. As a result of its survey the Court issued an exact formula for the computation of back pay under Decisions and Orders of the National Labor Relations Board. The language of the Court leaves nothing to be desired in clarity and describes beyond question the exact steps to be employed in determining back pay as authorized by Section 10 (c) of the Act. These standards were described by the Court in the following language:

> ". . . In effectuating the policies of the Act, the Board clearly may award back pay to discriminatorily discharged employees. This means that employees may be reimbursed for earnings lost by reason of the wrongful discharge, from which should be deducted net earnings of employees from other employment during the back pay period, Republic Steel case (U. S.), supra, and also sums which they failed without excuse to earn. Phelps Dodge Corp. v. NLRB, 313 U. S. 177, 197, 198, 85 L. Ed. 1271, 1284, 1285, 61 S. Ct. 845, 133 A. L. R. 1217. . . ."
>
> **(NLRB v. Gullett Gin Co., 340 U. S. 361, 363, 95 L. Ed. 337, 341, 342.)**

This decision becomes even more significant when it is considered as the culmination of earlier decisions wherein this Court specified the limits within which the Orders of the Board must be framed. The Court dwelled at length upon the Orders which the Board might direct to an employer and likewise laid down certain limitations beyond which the Board was prohibited from going in directing reinstatement and back pay.

> ". . . This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise

punitive measures and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board may be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial not punitive. Consolidated Edison Co. v. NLRB, 305 U. S. 197, 235, 236 . . . See also NLRB v. Pennsylvania Greyhound Lines, 303 U. S. 261, 267, 268 . . . We adhere to that construction . . .

We think that affirmative action to "effectuate the policies of this Act (chapter)" is action to achieve the remedial objectives which the Act sets forth. Thus the employer may be required not only to end his unfair labor practices; he may also be directed affirmatively to recognize an organization which is found to be the duly chosen bargaining representative of his employees; he may be ordered to cease particular methods of interference, intimidation, or coercion, to stop recognizing and to disestablish a particular labor organization which he dominates or supports, to restore and make whole employees who have been discharged in violation of the Act, to give appropriate notice of his compliance with the Board's order, and otherwise to take such action as will assure to his employees the rights which the statute undertakes to safeguard. These are all remedial measures. **To go further and require the employer to pay to governments what they have paid to employees for services rendered to them is an exaction neither to make the employees whole nor to assure that they can bargain collectively with the employer through representa-**

tives of their own choice. We find no warrant in the policies of the Act for such an exaction . . .

. . . All these measures related to the protection of the employees and the redress of their grievances, not to redress of any supposed public injury after the employees have been made secure in their right of collective bargaining and have been made whole . . .

This language should be construed in harmony with the spirit and remedial purposes of the Act. We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe penalties or fines which the Board may think would effectuate the policies of the Act. We have said that "this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board may be of the opinion that the policies of the Act might be effectuated by such an order . . ." (Emphasis supplied.)

(Republic Steel Corp. v. NLRB, 311 U. S. 7, 11, 12, 13, 61 Sup. Ct. 77, 79-80).

See also: **Consolidated Edison Co. v. NLRB,** 305 U. S. 197, 235-6; **NLRB v. Fotill Products, Inc.,** 180 F. 2d 441, 444, 9th Cir.; **NLRB v. Marshall Field & Co.,** 129 F. 2d 169, 172, 7th Cir.; **Reliance Mfg. Co. v. NLRB,** 125 F. 2d 311, 316, 7th Cir.

The language of the statute and judicial terminology used in its interpretation have uniformly expressed the Congressional intent to place the employee-discriminatee in status quo; to wit, "back pay," "reinstatement," "remedial," "make whole," "actual losses," "lost earnings," "sums he would have earned," and "restoration." There

are no Court decisions containing language which even implies that the Board may issue punitive orders.

In another decision subsequent to the controlling **Republic Steel** case, this Court re-emphasized that the authority of the Board to order, and the purpose of, "back pay" was to make the employee "whole," rather than to assess a penalty against the employer.

> ". . . Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred. To this the Board counters that to apply this abstractly just doctrine of mitigation of damages to the situations before it, often involving substantial numbers of workmen, would put on the Board details too burdensome for effective administration. Simplicity of administration is thus the justification for deducting only actual earnings and for avoiding the domain of controversy as to wages that might have been earned.
>
> "But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates is administrative resourcefulness . . .".
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> **(Phelps-Dodge Corp. v. NLRB, 313 U. S. 177, 197-198, 61 Sup. Ct. 845, 854.)**

We submit that it is beyond cavil that the authority of the National Labor Relations Board is limited to issuing remedial orders to effectuate the purposes of the Act.

CONCLUSION.

Since the evidence before the Board and the Court below did not justify the issuance of a punitive back pay directive against the Respondent; and since the National Labor Relations Board is not legally authorized to issue punitive orders, the Court below properly found no basis to justify a Decree directing the computation of back pay on a quarterly basis.

The Decision below is, we submit, correct and presents neither a conflict of decisions nor any substantial question warranting review. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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